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THE NUMBER OF HERITABLE BANDHUS IN THE MITAKSHARA SYSTEM.*

Bandhu succession is perhaps the one branch of Hindu Law where uncertainty and arbitrary speculation still hold the field and would continue to do so until statutory codification comes to our rescue.

In this Article I intend to draw attention to what appears to be a very simple matter, *viz.*, the total number of bandhus that could be recognised as heritable in the Mitakshara system. On this matter, in spite of 50 years' discussion, no two writers agree. The accompanying list illustrates this:—

1.	Sarvadhikari[1]	..	..	122
2.	Bhattacharya[2]	..	..	122
3.	Trevelyan[3]	..	..	123
4.	Mulla[4]	..	..	123
5.	Gour[5]	..	..	123 + 3
6.	Mayne[6]	..	..	128
7.	P. R. Ganapathi Aiyar[7]		..	230
8.	"Jurisprudence"[8]		..	382
9.	49 Madras 652[9]	..	..	2014
10.	Haradatta[9]	..	..	3142
11.	Mandlik[10]	..	..	4242
12.	Sarkar Sastri[9]	..	..	8134

*Contributed by Mr. M. A. Doraswamy Iyengar, M.A., B.L., Advocate of the Madras High Court and of the Mysore High Court.

(1) Hindu Law of Inheritance, 2nd ed., 1922, pp. 637—640.
(2) *See* below.
(3) Hindu Law, 2nd ed., 1917, pp. 402—410.
(4) *Ibid.*, 6th ed., 1929, pp. 66—71.
(5) Hindu Code, 3rd ed., 1929, pp. 1359—69.
(6) Hindu Law and Usage, 9th ed., 1922, p. 852—Table.
(7) 9 M.L.J. 54 at 69—71.
(8) 8 M.L.J. 53 at 67.
(9) *See* below.
(10) Hindu Law, p. 345; *cf.* 8 M.L.J. 53 at 61—64.

Some of the eminent writers like Ghose and Sarkar Sastri do not make any calculations nor give a prepared List of Bandhus. Both these severely criticise Sarvadhikari's theories and from this we have to guess what the probable total number would be according to their schemes. Let us now examine some of the above lists.

For the determination of heritable bandhuship four fundamental rules have so far been formulated. They are—

1. The degree-rule.
2. The rule of mutuality of sapindaship.
3. The rule of parent's mutuality of sapindaship.
4. The rule of fixed family lines.

The total number of bandhus depends entirely upon the view a writer takes about each one of these rules. On each of these rules wide and sometimes irreconcilable difference of opinion has become manifest.

About the first rule the divergence of opinion is widest. There are nearly seven points of view: (1) For purposes of inheritance the Mitakshara neither defines sapindaship nor formulates any degree-rule. Most of the writers have sought to borrow both from the Chapter on Marriage. Those who demur to this will have to analyse the cases of the persons mentioned in Satatapa's text and deduce a rule applicable for the purpose. This would give a rule of four degrees only and upon this rule we get a total number of 47 male bandhus only.[11] (2) But the majority of writers have agreed to apply an all-round rule of 5 degrees. Among these, however, it is only one—Mr. Ganapathi Aiyar—who has wholly and consistently adopted this rule. (3) For, led by Sarvadhikari, almost all these writers—Bhattacharya, Mayne, Trevelyan, Mulla and Gour—make an exception in the case of FMF3 (and S2DS2) and thereby adopt a special rule of 6 degrees, although they want us all to believe that FMF3 is not beyond 5 degrees. (4) As regards the 7 degree-rule, Sarkar seems to apply it all round both to paternal and maternal sides as well as to ascending and descending lines. (5) Venkatasubba Rao, J., in *Kesarsingh* v. *Secretary of State for India*[12] is inclined to apply the rule of 7 degrees to paternal side and of 5 degrees to maternal side. (6) Mandlik[13] followed by "Jurisprudence" applies the rule of 5 degrees to the maternal ascending side and the rule of 7 degrees to the

(11) *See* below.
(12) (1926) I.L.R. 49 M. 652: 51 M.L.J. 16.
(13) *Ibid.*, p. 350, Table II, *cf.* 8 M.L.J. 62-3.

paternal ascending side as well as to all descending lines whether descent is traced through a son or a daughter. (7) Hindu writers like Haradatta and Kamalakara compute the degrees from the point of view of the common ancestor and not of the parties.[14]

Much confusion prevailed about the second rule mainly because Sarvadhikari tacked to its formulation the other two rules also with the result that all those who felt themselves unable to accept the other rules attacked the main rule also. As regards the main rule, however, as distinguished from the other two rules, the majority are in favour of accepting it and the Privy Council also has approved of it. This rule necessarily cuts off a very large number of bandhus from heritability. In fact, on the basis of this rule you can have mainly an all-round five-degree rule and none else. For, as Mr. Ganapathi Aiyar points out, even where from one side you could proceed up to 7 degrees, from the other side which traces immediately through a female you could go only up to 5 degrees, so that, in order to preserve mutuality you have to adopt an all-round rule of 5 degrees.[15]

The third rule has been suggested by Sarvadhikari[16] as well as Ganapathi Aiyar.[17] The rule seeks to exclude the children of a parent where the parent is not a sapinda although the children may be sapindas. This rule also thus affects the number of bandhus.

The last rule was the pet child of Sarvadhikari. Analysing the cases of the 9 persons mentioned in Satatapa's Text this writer formulated that the claimant must always belong to the line of MF[18] of three fixed families—of P or of his parents. Apart from other vital defects this theory was *ab initio* fallacious. For, even in the lines of families found in Satatapa's Text there are two distinct divisions—agnatic (lines of P and of his F_1 to F_4) and cognatic, and it is only the latter division that admits of the tripartite family grouping. Sarvadhi-

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(14) *See* below.

(15) 9 M.L.J. 149. The illustration given here must be taken in the reverse order. The case of FMF_3 will be considered later.

(16) *Ibid.*, p. 598, foot-note.

(17) 8 M.L.J. 321—2.

(18) MF is Mother's father. Similarly F_2 is P'sFF, FM is Father's mother, S is Son, D is Daughter, B is Brother, D_2S_2 is Daughter's daughter's son's son and so on.

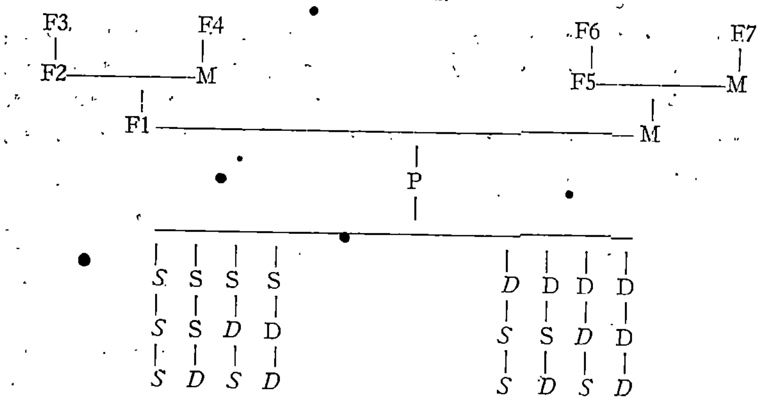
kari himself was therefore forced to add two more fixed family lines—those of P and of F_1 to F_4. Since the list was not exhaustive, the cognate division should all be filled up and then analysed. This division would then yield, according to Ganapathi Aiyar's calculations,[19] not three family lines only, but seven such lines—the MF lines of P, F_1, F_2, FM, M, MF and M_2. If the rule of 7 degrees is adopted the number of such family lines would further increase. It may now be taken without repeating the numerous criticisms levelled against it by several Judges and writers, that this theory of Sarvadhikari is now discredited as being untenable.

We have now seen the wide difference among writers about the number of bandhus and also the source cause for such difference. We shall now see the actual schemes of these writers as to how they arrive at their figures and compare the results.

Scheme under Four-Degree Rule.

The accompanying Table illustrates this scheme:—

TABLE I.



Among descendents those who are not repeated are italicised. In all there are 7 ascendent lines—3 agnatic and 4 cognatic, and then there is P's own line. In each line there are 7 male and 7 female descendents. Among the former 3 are agnatic and 4 are cognatic. These persons would satisfy every other rule of every writer. They would also satisfy the rule of spiritual benefit in addition. The scheme would correspond to the coparcenary scheme based on the rule of unobstructed heri-

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(19) 9 M.L.J. 65.

tage in agnatic succession. The total number of bandhus under the scheme would be as follows:—

(1) Male bandhus.

Cognatic ascendents	.. .. ..	4
Their 3 agnatic descendents	.. ..	12
4 cognatic descendents of 8 lines	.. ..	32
Total including DS	..	48

(2) Female bandhus.

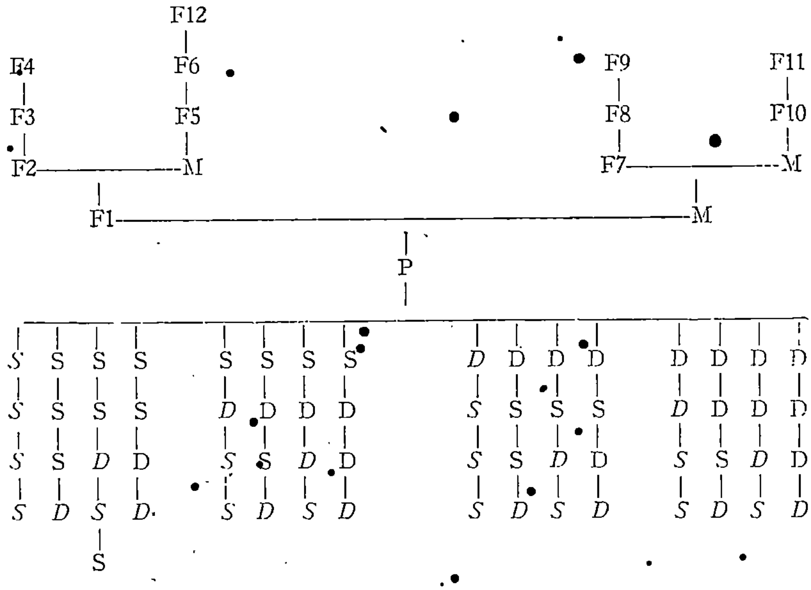
Wives of cognatic ascendents	.. ..	4
7 descendents of 8 lines	.. .. ..	56
Total including D	..	60

(3) Grand total excluding D and DS 47 *plus* 59 *equals* 106.

THE NORMAL SCHEME UNDER FIVE-DEGREE RULE.

The scheme would exclude FMF_3 and S_2DS_2 and would accept all the other three rules in full. It is illustrated by the accompanying Table II. Ganapathi Aiyar's scheme is simply its variation based on the rejection of the fourth rule.

TABLE II.



In this scheme there are 11 ascendent lines—4 agnatic and 7 cognatic. Of the 30 descendents of a line, 26 are cognatic,

of whom 8 persons, namely—D_2S_2, D_3S, DS_3, DSDS, DS_2D, DSD_2, D_2SD, D_4—are to go as they violate the fourth rule. There would then remain 11 female and 7 male cognatic descendents per line. The total number of bandhus would be as follows:—

(1) Males.

Cognatic ascendents	..	..	7
Their 4 agnatic descendents	..	..	28
7 cognatic descendents of 12 lines	..	..	84
Total including DS		..	119

(2) Females.

Wives of cognatic ascendents	..	..	7
11 descendents of the 12 lines	..	..	132
Total including D		..	139

(3) Grand total excluding D and DS 118 *plus* 138 *equals* 256.

Of these female bandhus about half a dozen only have so far received judicial recognition in Madras.

SARVĀDHIKARI'S LIST.

Sarvadhikari's scheme is the original model for all the popular text-book writers on Hindu Law. The above Table II illustrates all these variations. From the previous scheme Sarvadhikari's list excludes DS in P's line and SD_2S in F_1 to F_4's lines[20] and includes FMF_3 and 3 of his cognate descendents.[21] The result is as follows:—

Cognatic ascendents	..	..	8
Their 4 agnatic descendents	..	..	32
7 cognatic descendents of cognatic ascendents except FMF_3	..	..	49
6 cognatic descendents of P and F_1 to F_4	...	...	30
3 cognatic descendents of FMF_3		..	3
Total		..	122

(20) Pp. 637—8, Nos. 27—30.

(21) P. 639, Nos. 85—87.

This List, however, does not conform to some of the principles enunciated by Sarvadhikari himself in the preceding portion of the chapter. For instance, no reason is offered for the omission of SD_2S of F_1 to F_4 in the List. On the other hand he is expressly stated to be atma bandhu, *ex parte* paterna to whom P is related as a matri bandhu.[22] Again, Sarvadhikari expressly states that all the 7 cognatic descendents of FMF_3 should be excluded as "being more than five degrees removed from the deceased,"[23] but the List includes 3 of them for which no explanation is given. Further, he includes in brackets[24] (indicative of some reluctance) S_2DS_2 as a bandhu and his Tables I-*a* and II facing pp. 606—7 of his work, where this heir figures as S5-*a* show that S_2DS_2 of P, F to F_4 and of FMF and FMF_2 should be recognised. But the final List omits these 7 persons without any explanation. P is the S_2DS_2 of his FMF_3 and when FMF_3 is to be included among ascendents there is no reason whatsoever to reject S_2DS_2. Both must stand or fall together.

Apart from these glaring inconsistencies which have not been noticed in the revised edition, the inclusion of FMF_3 by Sarvadhikari has the effect of upsetting one or other of the first three fundamental rules of bandhuship, and in order to reduce to a minimum the havoc caused by his act, poor Sarvadhikari is driven to the resort of all kinds of anomalous expedients to preserve, so far as may be, the sanctity of the second and the third rules at the expense of the first. Thus he expressly justifies the extension of the degree limit for the inclusion of FMF_3 on the sole ground that P and FMF_3 are mutually sapindas.[25]

If this were a crucial test, then we may have to include the father of FMF_3 also as he is P's sapinda by frog's leap. But the learned Doctor excludes him as he violates the third rule; for, this FMF_4 is not a sapinda of P's father.[1] Nor is this a conclusive test. For instance, the father and grandfather of F_4 would satisfy the first and the third rules but are still excluded because, as Ganapathi Aiyar points out, their cognatic descendents would violate the second rule. For the same reason, we cannot include more than 5 degrees of agnatic de-

(22) P. 610; in Table I-*a*, facing p. 606 SD_2S is S_7.
(23) P. 613.
(24) Pp. 599, 603, 605, 606, 610.
(25) P. 600.
(1) P. 598, foot-note.

scendents of any of the maternal cognatic ascendents nor admit any of the cognatic descendents of FMF3. They would all violate the second rule. The 5th and 6th agnatic descendents of FMF, FMF2 and FMF3 do not no doubt violate the first two rules but they cannot come in as they violate the third rule. For, they would not be sapindas of P's father.

Expressed otherwise, the position comes to this: In all the above instances, the general degree rule as stated by the Mitakshara (of 7 and 5 degrees as the case may be) is fully satisfied but in every case the rule of an all-round five degrees is violated. Nevertheless these cases are not excluded on that score but on account of conflict with the other two rules. The result is that a universal rule of five degrees becomes untenable while the rule of 7 and 5 degrees would not have free sway but would be conditioned and twisted by the other two rules. In other words, there cannot be a fundamental rule of degrees at all. There would no doubt be a rule but it would not be a fundamental one. This leads to the anomaly of the offspring becoming more fundamental than the source, and existing and growing at the expense of the latter. We cannot escape this vicious circle until we concur with Sadasiva Aiyar, J., and boldly think of doubting the rule of mutuality in both its aspects.

It is this rule of mutuality that is now governing the law of bandhu succession. The third rule is partly a corollary and Sarvadhikari includes the fourth rule indistinguishably in this rule of mutuality. And it is this rule that is regulating the degree-rule. Thus all the four rules centre round this theory of mutuality. The theory no doubt evoked considerable criticism but almost the whole of it was directed against the fourth rule which Sarvadhikari had not separated from the second. The second rule by itself has been sought to be deduced from Manu IX. 187 as interpreted by Visveswara and Balam Bhatta[2] but it is not easy to say if such a deduction is correct.

It is a matter of considerable significance that none of the dozens of the commentators of Manu have interpreted this text which would in any way lend support to the above deduction. In fact Sarvadhikari who finds fault with Sir W. Jones's translation of this text as not bringing out the rule of mutuality contained in it admits that Jones's translation is based on the gloss of Kulluka Bhatta.[3] Even if we ignore the silence and possible opposition of the ancient and authoritative commentators of

(2) Sarvadhikari, pp. 443—4; 22 Cal. 339; 42 Cal. 384 (P.C.).
(3) P. 443.

Manu to such an interpretation, it is doubtful if we could support it by the modern critico-historical method. In Manu's scheme of inheritance cognates have no place, and his rules, whatever they may be, cannot be applied to cognatic succession. Manu calls the 12 kinds of sons one's bandhus.[4] Sarvadhikari himself admits that it was Yajnavalkya who for the first time recognised "Bandhus" as heirs[5] and maternal ancestors as being entitled to receive funeral oblations.[6] Such being the case, Manu's rules for sapindas, in the sense of the word then prevailing, cannot, on any validly historical and comparative principle, be extended to cognates or bandhus. Manu also states a single universal rule of 7 degrees.[7] If this were adopted for cognates also the problem of mutuality or of its want would not arise at all. If Manu had in contemplation the case of cognates he would either have not enunciated the alleged rule of mutuality or have expressly applied the rule of 7 degrees to them also. But so far as the scheme he actually puts forward is concerned, he is consistent and clear. It is only when his alleged rule, which was formulated before the idea of admitting cognates to inheritance was born, is sought to be extended to them, coupled not with his rule of 7 degrees but with Yajnavalkya's rule of 7 and 5 degrees, that this trouble arises. But this attempt, to say the least, is unhistorical and not logical. Further, the context where this text occurs in Manu cannot be held to favour the intended interpretation. For, after stating in verse 185 that in the absence of sons, the father and then brothers succeed, Manu in the next verse interprets Pinda to mean funeral oblations. This is immediately followed by the text in question stating that sapindas next succeed. Here there was no occasion to enjoin mutuality at all.

Jimutavahana in fact relies very strongly on this context to support the meaning he gives to the word "sapinda". But how does the rule of mutuality fare in his system? Among his class of sapindas it is only the collaterals that can be said to have any mutuality with P; for, P is a sapinda of, say his F_2S_2, because the former offers pinda to the common ancestor to whom the latter offers pinda, and F_2S_2 is a sapinda of P because he offers pinda to the ancestor to whom P offers pinda. Their position is thus perfectly and exactly mutual. But this is not the case between P and either his ascendents or his descend-

(4) IX. 158.
(5) P. 221, *cf.* 42 Cal. 384 (P.C.).
(6) P. 45.
(7) V. 60.

ents. For example, F2 is a sapinda of P, because P offers pinda to him but P is a sapinda of F2 not because the latter offers pinda to P but because he receives it from him. The case of P and S2 is similar. Thus in this system sapindaship is determined not on the basis of reciprocation but on that of independent rules.

Even apart from these considerations, it is doubtful if the text even in its special form of translation would really bear out any theory of mutuality. Bannerjea, J., translates it on the basis of the commentaries of Visveswara and Balam Bhatta as "the property of a near sapinda shall be that of a near sapinda."[8] Sarvadhikari on the basis of the same writers offers a different translation which reads as "Whoever is near to a sapinda, his property shall belong to him."[9] *Prima facie* both the translations contain elements of ambiguity. Taking the latter first, the words "whoever," "sapinda," "his" and "him" are capable of meaning either P or the heir. By permutation we get four possible interpretations of this translation, *viz.*, (1) Where P is near to a sapinda heir (of P), P's property belongs to the heir; (2) Where P is near to a sapinda heir (of P), that heir's property belongs to P; (3) Where an heir of P is near to his (the heir's) sapinda P, P's property belongs to the heir; (4) Where an heir of P is near to his (the heir's) sapinda P, the heir's property belongs to P. The first interpretation is indistinguishable from that of Sir W. Jones. In the fourth, P and the heir exchange places but the meaning is otherwise identical with that of the first. The second and third interpretations also mean that the properties of P *or* his heir go to their respective near sapindas. Thus Sarvadhikari's translation in any view of the case is not distinguishable from that of Jones. It need not be pointed out that these four interpretations are alternative and not simultaneous. It is only when they are taken simultaneously that any theory of mutuality could be implied, but this is opposed to all rules of grammar and logic. As regards Bannerjea's translation, he himself comments upon it to mean "From this it is clear that a man in order to be a heritable sapinda of the prepositus must be so related to him that they are sapindas of each other." It is doubtful if all this could be read into his translation. In the text as well as in the context the subject-matter of discussion is P. He is the known quantity and from him we proceed to ascertain his heir the unknown quantity. But Bannerjea's interpretation would

(8) 22 Cal. 339.
(9) P. 443.

reverse this position. For, his interpretation would read thus: "The property of a near sapinda of an heir of P shall be that of a near sapinda of P." Are we to hold that P is an unknown quantity who has to be specified as a sapinda of his own heir who is not yet named and ascertained? It seems to me that the mistake of Sarvadhikari and his followers arises in taking the words of the text not in a generic sense but in a narrow sense as referring to P and his heir individually. The text does not seem to refer to two individuals merely but to heirs in general and it merely states that sapindas generally take each other's property in the order of their nearness. The text enunciates not both propinquity and mutuality as Sarvadhikari thinks[10] but only propinquity.

It may be argued that, whatever may be the natural meaning of the text or the idea of Manu or of any other Commentator, the Mitakshara uses the text to deduce this rule of mutuality and has been so understood by the authoritative commentators of the school like Visvesvara and Balam Bhatta. But this argument is not tenable. It is most important to note the context in which this text of Manu is cited by the Mitakshara. When arguing for the priority of the mother over the father, the Mitakshara states as follows:[11]

"The father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text, 'To the nearest sapinda the inheritance next belongs.'"

"Nor is the claim in virtue of propinquity restricted to sapindas but, on the contrary, it appears from this very text that that rule of propinquity is effectual, without any exception, in the case of Samanodakas, as well as other relatives, when they appear to have a claim to succession."

Here the word used throughout is "Pratyasakti" or propinquity. There is not the ghost of an idea of mutuality. There was no need or occasion to think of mutuality. No question of mutuality would ever arise in the case of oneself and one's parents. It would be an insult to Vijnanesvara to say that he bases the superiority of the mother's claims over the father's on her possessing mutuality of sapindaship which the father lacks or that she possesses it in a greater degree than the father.

(10) P. 445.
(11) II. iii. 3—4. The same text is next cited to prefer the full brother to half brother, II. iv. 5.

Under the context he could think, and think only of propinquity, and for this he cites Manu's text. He then goes to extend this principle of propinquity to the case of all heirs. It is thus perfectly clear that even if the text of Manu contains both the ideas of propinquity as well as mutuality, the Mitakshara accepts only one of them.

If we take the two paragraphs in the text of the Mitakshara separately, the absurdity of the theory becomes very clear. As already stated the idea of mutuality cannot have any place in a competition between the father and the mother. The third paragraph as it stands does not therefore support any theory of mutuality. Nor can the fourth be said to do so. If it were so it would have been expressly stated. For, if there was any occasion and appropriate place where the rule of mutuality should have been clearly and unambiguously stated it was in this paragraph. But what do we find here? Nothing but the rule of propinquity. Even if we could suppose that the previous paragraph adumbrates a theory of mutuality the fourth does not do so.

If we credit Vijnanesvara with at least as much common sense and shrewdness as we profess, we must admit that he would have known that the break in mutuality of sapindaship arises not among agnates but among cognate sapindas of the paternal side. And if he really wanted to enunciate any rule of mutuality he would have done so only when he was dealing with the succession of such cognate sapindas. But he is altogether silent about this rule when he is dealing with bandhus. Nor, for the matter of that, does he anywhere expressly, clearly and unambiguously enunciate any such rule. Even apart from Vijnaneswara, how is it that not a single other commentator including Visvesvara and Balam Bhatta state any such rule in unequivocal words either when dealing with bandhu succession, which is the proper place to do so, or anywhere else? The Sarvadhikari school have not been able to cite a single passage from any of these which would directly or indirectly show that these writers had any comprehension of such a rule. On the other hand, writer after writer of the Southern School has sought to lessen the rigour of the degree-rule even in the case of marriage in order to validate the customary sanction of the marriage of maternal uncle's daughter. The degree-rule is a rule of exclusion in marriage but is a rule of inclusion in succession. A tendency that aims to restrict the number of degrees in the former case would aim to increase, not to restrict the

same in the field of succession. A rule of mutuality which would exclude a number of persons otherwise qualified would be repugnant to such a tendency. It is impossible to find any support anywhere for this theory until the fertile brain of Sarvadhikari invented it fifty years ago.

It may be said that at last two eminent writers—Visvesvara and Balam Bhatta—interpret this text when commenting on the Mitakshara in such a way as to support the rule of mutuality. Even supposing they do so, how far can it be recognised as authoritative? It is clear that their view is unprecedented and is not also followed by anybody else. Several other more useful doctrines of Balam Bhatta are discredited as being novel and peculiar, and why then should we make an exception in the case of this rule of mutuality? Is it demanded on the ground of natural justice or equity? On the other hand, equity and natural justice would at least in this matter join hands with the letter of the law to oppose its introduction. These two writers are authorities only in the Benares School and need not be followed by the other schools. Even in the Benares School their position is not of first rank.[12]

But is it after all true that these two writers really adumbrate any such theory of mutuality? Their comments on the two paragraphs of the Mitakshara, wherein the text of Manu in question occurs, do not contain any such theory. They do not even indirectly hint at it. What they do is to interpret the text of Manu cited in the passage of the Mitakshara in a peculiar way. If this interpretation be held to support any full-fledged theory of mutuality it is opposed to the context and to what precedes and follows the citation. But it is not correct to say that the interpretation of the text contains any such unequivocal and full-fledged theory of mutuality. Their interpretation of the text is fully brought out in the translations of Sarvadhikari and Bannerjea[13] and what we have said about these translations equally and exactly applies to the original interpretations of these two writers.

It would also be instructive to note the place where some of the other writers cite this text of Manu and the interpretation they put on it. After finishing the case of the compact series of heirs, Apararka[14] takes up the case of Gotrajas and there cites this text and declares that Gotrajas succeed in the

(12) *Cf.* 37 All. 604 (P.C.).
(13) Sarvadhikari, p. 444.
(14) *Ibid.*, p. 330.

order of their propinquity which is however to be determined by the text of spiritual benefit. In this scheme, then, mutuality has no place. The Smriti Chandrika[15] cites this text to justify its two-line scheme of agnatic sapinda inheritance which has now been disapproved in *Buddha Singh* v. *Laltu*.[16] The learned translator of this work appends a special foot-note[17] to point out that this text is understood differently in the Smriti Chandrika and the version of Jimutavahana which corresponds to the translation of the text by Sir W. Jones "does not seem to be in strict accordance with the Sanskrit Text as quoted in the Smriti Chandrika." According to him the text should be translated as, "whoever is the next in the line of kinsmen (pinda), to him the inheritance belongs." This version as well as the context are both opposed to any theory of mutuality being deduced from the text. Visvesvara Bhatta in his *Madana Parijata*[18] cites the text to declare that among brethren the order of succession is determined by propinquity. Here also there is no whisper of mutuality. Chandeswara in his *Vivada Ratnakara*[19] cites it for the case of brothers and interprets the word "*anantarah*," "next" to mean the nearest. He is not aware of any theory of mutuality. Nilakanta[20] cites it to bring in the sister among the Gotrajas. Mandlik's translation of the text reads thus: "The wealth (of the deceased) goes to whoever is next among sapindas and the rest." This text is immediately followed by a text of Brihaspati which corroborates it. There is no idea of mutuality at all present to the mind of Nilakanta or to his learned translator. The same text is translated in Stoke's work thus: "To the nearest sapinda (male or female) after him in the third degree the inheritance next belongs."[21] This translation is approved by Setlur.[22] Madhavacharya's *Dayavibhaga* cites the text to prefer the uterine brother to the half brother and then in connection with the succession of the spiritual pre-

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(15) T. Krishnaswamy Aiyar, XI. v. 9, 2nd ed., 1867, p. 193.

(16) 37 All. 604 (P.C.).

(17) P. 194.

(18) Ch. VIII. We have three different translations of the text. Setlur, Hindu Law Books of Inheritance, p. 531, adopts Jone's translation. B. Sitarama Sastri, 9 M.L.J. at 102 (Jour.), does the same. Sarvadhikari, p. 340: "To the nearest kinsmen the property of the (deceased) sapinda next belongs."

(19) Ch. XXXIV. Sarv., pp. 346—7: "He who is next to the (deceased) sapinda, the property devolves upon him." B. Sitarama Sastri, 8 M.L.J. at 170 (Jour.): "To the nearest among the sapindas goes the wealth of the deceased." Setlur, p. 233, adopts the last.

(20) Sarv., p. 383.

(21) Hindu Law Books, p. 89, IV. viii. 19.

(22) P. 100.

ceptor.[23] Burnell's translation reads thus:[24] "He who is the sapinda in course of succession, let him have the wealth." Setlur renders it differently[25]: "Whoever is the nearest sapinda, to him the wealth belongs." Vachaspati's *Vivada Chintamani*[1] cites it in connection with brothers and Setlur has adopted the version of Jones. The Sarasvati Vilasa[2] and the Viramitrodaya[3] both cite the text, like the Mitakshara, to prove the superiority of the mother to the father in the matter of propinquity and literally repeat all the arguments of the Mitakshara. Setlur has adopted the version of Jones for the latter work and renders it thus for the former:[4] "The nearest among the sapindas takes his wealth." This review clearly shows that the idea of mutuality was not known to these writers or to their translators.[5]

It is therefore submitted that the acceptance of this theory of mutuality by the Privy Council requires reconsideration.

Now that we are at it, a few words may be said about the third fundamental rule also. Of the only two writers that suggest it, Sarvadhikari does not formulate it as an express rule. He merely wants to exclude sapindas by "frog's leap" and this necessarily creates this rule. Sarvadhikari does not discuss it but cites Mitra Misra in support of his view. Mitra Misra when arguing for the inclusion of the maternal uncle as a bandhu on the ground that his son is named in Satatapa's text, states: "It is extremely improper to give the heritage to the sons and to exclude from succession their father, though nearer in degree of affinity."[6] This argument, so far as it goes, is perfectly valid, but it would be dangerous to push it to extremes. It is not good logic to convert an argument for inclusion of omitted persons into one for exclusion of admitted persons. Mitra Misra's argument when literally taken would not support Sarvadhikari's conclusion at all; for, on the one hand, the subject of exclusion is not P or his father but a remote ascendent like FMF4, and on the other the argument states that since the son is included as a sapinda (by frog's leap) his father who is omitted for some other reason should nevertheless be included. The father may not be a sapinda for other purposes,

(23) Paras. 62, 67. Setlur, p. 334.
(24) Sarvadhikari, p. 352.
(25) P. 334.
(1) Setlur, p. 268.
(2) Paras. 569—70, Setlur, p. 181.
(3) III. iv. 2. Setlur, p. 413.
(4) P. 181.
(5) *See* also the able note on *Ramachandra's case* in 27 M.L.J. 109—120 (Jour.).
(6) III. vii. 5.

but on Mitra Misra's argument he will have to be deemed to be nevertheless heritable. Beyond this we cannot push this argument. For, there are about four classes of instances where P may be a sapinda of a claiment, whereas his father or ascendent may not be so. These are: (1) P's wife; (2) P's maternal sapindas; (3) P's descendent sapindas that are beyond the degree limit to P's ascendents, *e.g.*, S6 is beyond 7 degrees to P's father, and P's S2DS, SDS2 or SD2S are not sapindas of P's F3 or F4; (4) P's ascendent through his father to whom P is a sapinda by "frog's leap," such as FMF4, FMFMFM, FM2F3 and FM3F2. P has perfect mutuality of sapindaship with these ascendents. To these, P as well as his father, are both sapindas but to P's father they are not sapindas. Mitra Misra's argument cannot apply to the first three classes at all.

Mr. P. R. Ganapathi Aiyar defines it a little more carefully and more elaborately. He states the rule thus[7]: "If a male or a female is not a sapinda of another, much less can the son of that male or female be the sapinda of that other, as his father or mother, having no corporal particles (of the given person or their common ancestor) in common with the given person, can transmit none to his son." The reason for this is to be found in the very definition of sapindaship in the Mitakshara which says that the grandson is a sapinda of his grandfather and the rest because the latter's particles of the body have entered into his own through his father in succession. Mr. Aiyar's rule as it stands is too wide, while the reason for it confines it to the fourth class of instances only. But he does not seem to perceive it. For, he states that the only class of instances of the kind which is not governed by the rule is the second class stated above. He does not allude to frog's leap theory. His reference to the mother is incorrect since frog's leap could never occur on the maternal side.

There is no express authority to be found anywhere in support of this rule. Mr. Aiyar's attempt to take it as an axiomatic deduction from the definition of sapindaship is not very convincing. It is not always a safe method in law. For instance, the Mitakshara elaborately argues that in all cases propinquity is the governing rule of preference and that the mother is more propinquous than the father. In the case of bandhu succession it states that the three classes succeed in the order of their propinquity. From these doctrines it must follow as an axiom

(7) 8 M.L.J. 313 at 321 and 322 (Jour.).

that matri bandhus should be preferred to pitri bandhus. But the Mitakshara enumerates otherwise which is accepted as established law. Similarly, the third fundamental rule of bandhuship may be an axiomatic deduction from the definition of sapindaship and may be valid on medical and physiological grounds, but nevertheless we have express authority to recognise sapindaship by frog's leap and this express rule cannot be repudiated on the ground of its contradiction with the definition. In fact there is no contradiction at all here. According to the definition of sapindaship as well as according to medical and physiological grounds, P's father is much more related to the ascendent sapinda by frog's leap than P himself but the anomaly arises only through operation of the degree rule. The degree rule is a convention, not a fundamental natural law, and the modification of this convention by means of other conventions in the form of contrary exceptions cannot be made much of.

After all, it is P who is the centre of interest and the starting point of computation. To concern ourselves with P's father or the claimant (as in the case of the rule of mutuality) is not sound logic. The principle should always be to interpret the rules of succession in favour of the claimants. Sapindaship which is a matter of exclusion for purposes of marriage is a matter of inclusion in the case of inheritance. There is thus no reason to accept the third rule of bandhuship.

(To be continued.)

SUMMARY OF ENGLISH CASES.

BIRMINGHAM CORPORATION *v.* INLAND REVENUE COMMISSIONERS, (1930) A.C. 307: 99 L.J.K.B. 299.

Income-tax—Local authority—Housing scheme—Interest on housing loans—Government paying subsidy towards loss on the scheme—Interest paid collected through the Exchequer subsidy—If interest paid out of profits brought to charge to income-tax.

The Birmingham Corporation undertook an Assistant Housing Scheme under the Housing, Town Planning, etc., Act, 1919, and to assist the scheme raised loans which were secured on the revenues and property of the Corporation. The Corporation had one fund only—borough fund—out of which all pay-

ments were made. Interest was paid on the loans raised for the housing scheme and income-tax was deducted at the time of payment to the creditors. In accordance with the regulations, a separate account was maintained in respect of the scheme and the loss that the Corporation sustained by the working of the scheme was recovered from the Exchequer by means of a subsidy. The question arose, if the Corporation was liable to account to income-tax for the sums that it deducted when paying interest. The Corporation contended that interest was paid out of the borough fund which was already charged to tax. The accounts were passed by the auditors and the subsidy paid covered also the interest on the loans.

Held, that as the effect of the form of the housing account charging the gross amount of interest as an element of loss intended to result in receipt of a subsidy from the Government and followed by the actual receipt of the money based upon the representations contained in it, the Corporation must be deemed to have said that they paid the interest out of untaxed funds and cannot now escape assessment.

FRY *v.* BURMA CORPORATION, (1930) A.C. 321: 99 L.J. K.B. 305.

Income-tax—Foreign Company—Transfer of managing office to England from the foreign country—Trade continuing as before without any alteration—Company whether newly set up and commenced in the year of transfer.

A Company was incorporated under the Indian Acts and till 1925 not only did the whole of its business, but managed the whole of its business, in Burma. As a matter of fact the majority of its shareholders were persons who lived in England. In 1925, the Company resolved to manage their business in England and established a regular office in London and as a result it became liable to income-tax as resident in the United Kingdom and carrying on business elsewhere. An assessment for the year ending April 5, 1926, was made on the Company on the basis of the profits of that year under sub-r. 2 of R. 1 of the rules applicable to cases I and II of schedule D. The Commissioners held that as there was no change in the character of the trade and as it was going on exactly as before 1925, except that the office was shifted to England, the rule applicable to case I applied and the average of the three years was to be taken for assessment.

Held, that "trade" in Rule 1, Sub-Rule 2 of the Rules applicable to cases I and II must bear its ordinary meaning and not mean "trade controlled in this country" or "home trade". The result of the transferring of the control of the trade to England so that from that date the trade was partly carried on there was not to set up and commence the trade within the year of assessment so as to render it taxable on that years' income. There is no reason why, when the trade still continues, the profits made at the time when it was not taxable should not be taken into account for the purpose of computing profits in a year when it is taxable.

STANYFORTH *v.* COMMISSIONERS OF INLAND REVENUE, (1930) A.C. 339: 99 L.J.K.B. 327.

Revenue—Stamp duty—Re-settlement of real estates—Clause reserving power of revocation of the appointments—"Value of the property conveyed or transferred" with the clause—If the powers of revocation and new appointment can be disregarded in calculating value.

Under a previous settlement a joint power of revocation and re-appointment was vested in *P* and *H*, who were the 1st and 2nd tenants for life of the estates and they in exercise of that joint power executed a deed poll which itself contained a fresh power of revocation and new appointment in their favour. By S. 74 of the Finance Act, 1910, "a conveyance or transfer operating as a voluntary disposition *inter vivos*" (which the deed in question was held to be) "shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred the amount or value of the consideration for the sale."

Held, that in arriving at the value of the property conveyed the overriding powers of revocation and new appointment ought to be taken into account. The question is what the property would have fetched in open market when the sale is subject to drastic provisions of defeasance as in this deed and therefore only a nominal value ought to be attached for stamp duty. "Property" in the section means "subject-matter of the conveyance or transfer".

Earl of Westmorland v. *Inland Revenue Commissioners,* (1928) 1 K.B. 703, overruled.

KHOO HOOI LEONG *v.* KHOO CHONG YEOK, (1930) A.C. 346.

Custom—Straits Settlements—Chinese residents therein—Custom of legitimation by recognition—Repugnant to English Law—If can be applied.

A Chinese resident Lowi in the Straits Settlements executed a deed in favour of his "sons and grandsons". The settlor had in addition to a t'sai or principal wife, one or more t'sips or lawful secondary wives. For some time he was in sexual connection with a woman *P* and during that time the appellant *K* was born to him by her. *P* was a Catholic Christian woman and it was not clear, if during this connection her husband was alive. Shortly after the birth of *K* she married another Christian.

Held, that no form of marriage ceremony is necessary to create the position of a t'sip, but the connection must be permanent and not only of a temporary or casual character and as *P's* connection was only temporary, she was not a t'sip. The father recognised *K* as his son and that is enough to establish legitimation by recognition according to Chinese custom but as that custom was not part of the law operative in the Colony and as the custom treating illegitimate natural son as legitimated by the mere fact of subsequent recognition is repugnant to common law of England, the custom cannot be recognised in modification of English law. No presumption can be drawn that *P* was a t'sip from the fact of the recognition of *K* by the settlor as according to Chinese custom "a mistress cannot be recognised and yet her son may".

BENJAMIN KNOWLES *v.* THE KING, (1930) A.C. 366: 99 L.J.P.C. 108.

Ashanti Administration Ordinance (No. 1 of 1902), S. 9 Murder trial—Trial to be as per procedure in Gold Coast Colony—Exception so far as is practicable in the locality—Trial without jury—Presumption in favour of impracticability—Criminal cases—When Privy Council will interfere.

According to the Ordinance the procedure in criminal cases was to follow the procedure obtaining in the Gold Coast Colony "so far as it is practicable and local circumstances permit". In Gold Coast trials in cases punishable by death were compulsorily triable with a Jury. The appellant was sued in Ashanti for murder of his wife without a jury and con-

victed. It was found that as a matter of fact there never has been hitherto trial by jury in Ashanti.

Held, that the maxim *"Omnia praesumuntur rite et solemniter acta"* applied and that it could be presumed that under the local circumstances jury trial is not practicable. The Board does not sit as a Court of Criminal Appeal and will not review criminal proceedings unless substantial and grave injustice has been done or the conviction be without jurisdiction. But as the Judge did not at all consider whether the standard of proof required to prove murder as against man-slaughter was reached in the case, and as the evidence did not support a conviction of murder, the conviction was set aside.

EXCELSIOR WIRE ROPE COMPANY *v.* CALLAN, (1930) A.C. 404: 99 L.J.K.B. 380

Negligence—Trespassers—Liability of owner for injuries to—Dangerous machine—Extent of duty to trespassers.

Two children were injured by the appellant's haulage appartus being set in motion to carry some trucks. It was in evidence that the employees knew that the place wherefrom the wire ran was frequented by children who played with the wire. Just before the wire was used, a little child was seen swinging on the wire. There were two men employed for the purpose of putting the wire properly round the pully and for driving the children away and they drove the child away. But they went back and started the machinery without being clear that the wire was free from children then and the accident to the children who got on to the wire again was the result. The land over which the wire ran did not belong to the appellants but they had a license to erect it there.

Held, as the appellants knew that when the machine was going to start it was extremely likely that children would be there and with the wire in motion, would be exposed to grave danger, there was a duty cast on the appellants when they set the machine in motion to see that no child was there. The mere fact that they were not occupiers of the land on which the apparatus ran does not remove the case from the category of those cases where the land was in the occupation of the person owning the dangerous machine. The land was in their charge. In the circumstances it was held to be immaterial to decide whether the children were or were not trespassers.

JONES *v.* LEEMING, (1930) A.C. 415: 99 L.J.K.B. 318.

Income-tax—Purchase and re-sale—Isolated transaction and not one of a series—No trade on purchase and re-sale—Profit, if liable to income-tax—Income-tax Act, 1918, *Sch. D., case VI.*

The respondent joined with three others in acquiring two options to purchase certain rubber estates in Malay. Ultimately the two options were sold at a profit. So far as the respondent was concerned, it was an isolated transaction, there having been no transactions like it before or after. The Commissioners found that it was not a concern in the nature of trade, but taxed him on the profit.

Held, income-tax is a tax on income. The profit made by the respondent being the result of an isolated transaction of sale but not a transaction of sale by way of trade, it cannot be called income, but only a capital accretion and so outside the category of annual profits or gains. It is more like the case where a person bought shares in two companies which were going to be amalgamated, and then sold equivalent shares in the amalgamated company at a profit. The accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value and yield a profit.

Cooper v. *Stubbs,* (1925) 2 K.B. 753, distinguished as a case dealing with the profits of transactions extending over a period of years.

FRY *v.* SALISBURY HOUSE ESTATE, LTD.: JONES *v.* CITY OF LONDON REAL PROPERTY CO., (1930) A.C. 432: 99 L.J. K.B. 403.

Income-tax—Letting a building in parts for offices—Landlord assessed as owner—Landlord supplying cleaning, heating, etc., services for additional charges—Profit therefrom—Assessment on profits, including the rents also therein—Deduction of rates paid as owner—Method of assessment if correct.

The respondent Company were owners of a large building containing some 800 rooms, which were let by the Company to the tenants for offices. The Company maintained a staff of porters and cleaners, who performed certain services like cleaning, heating, etc., to the tenants for which additional charges were made by the Company. The Company was charged as landlord under Schedule A in respect of the annual value of

the building. The Commissioners now assessed the Company under Schedule D upon the profit of the trade, but in ascertaining the profits, it included also the rents recovered by the Company as landlord and gave credit to the tax paid under Sch. A.

Held, the land owner was not carrying on a trade with regard to the property and was, therefore, assessable under Schedule A only, on the basis of the conventional annual value. The respondents were liable also under Schedule D in respect of the profits from the services rendered to the tenants. By the operation of the assessment under Schedule A, which is made imperative by the Statute, the income of the assessee is so far dealt with and cannot be dealt with again. This does not mean that the assessee may not be liable in respect of other income under other schedules but only the income from real property cannot be dealt with over again.

Rosyth Building and Estates Co. v. *Rogers*, 8 Tax Cases 11, overruled in so far as it says that there is an option to the Revenue Commissioner to select which schedule they would prefer to tax the assessee under.

The cases which indicate that the Inland Revenue authorities may have an option as between several cases of any given schedule upon which they may determine to assess the taxpayer distinguished, as by an option within a schedule the general scheme of the Act is not disturbed, but by an option to select schedules, it will be totally changed.

HOLE *v.* GARNSEY, (1930) A.C. 472: 99 L.J. Ch. 243.

Company—Rules—Alteration of by a 3|4th, majority—Alteration requiring members to take additional shares—If intra vires *and binds those who did not vote for or consent to it.*

By R. 12 of a Company's original rules passed in 1910, it was provided that "Individual members shall hold at least one share for every 20 acres or fraction thereof farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500" and "Milk retailers shall hold at least 6 shares of every churn of 17 gallons retailed daily by them . . . ." In 1922, it was amended by a 3|4th majority as required by the rules to the effect that every member should hold at least shares of the nominal value of 5*l*, for every 20 acres or fraction thereof and milk producers should hold shares on the above acreage basis or at least shares of the nominal value of 5*l*. In 1923, the Company went into liquidation and the question arose, if members who joined the Com-

pany prior to 1922—date of the amendment—and did not vote for or consent to the amendment were bound by the amendment and liable to contribute on that basis. The Company was registered under the Industrial and Provident Societies Act, 1893.

Held, reversing the Court of Appeal, (1929) 1 Ch. 321 (Lord Buckmaster dissenting), that a contract to take extra shares and incur extra liability which is not set forth in the original rule, but only introduced through a general power of the amendment of the rules is too vague to be enforced and is bad at common law. The alteration here did not simply affect the rights of the member in the capital of the Company but imposed a perfectly new and outside liability upon him and unless it was voted for or accepted by the member expressly or by conduct, it cannot bind him.

Biddulph and District Agricultural Society's Case, (1927) A.C. 76, explained as a case where the member accepted the situation arising out of the altered rules by applying for shares and accepting and paying for them.

SHOTTS IRON CO. *v.* FORDYCE, (1930) A.C. 503: 99 L.J. P.C. 101.

Workmen's Compensation Act, 1925, *S.* 14, *Sub-S.* (1) (*b*)—*Failure to claim compensation within six months—Reasonable cause—If a question of law.*

A workman who was injured in 1924 in the course of his employment reported the fact to the proper officer, but continued in the employment without claiming compensation, though all the while he suffered considerable pain therefrom. He left the employment in 1928, when as a result of muscular rheumatism occasioned by the injury he was totally incapacitated and fit only for light work. He did not intend to claim compensation so long as he was able to earn his full wages in the service of his old employers.

Held, the question whether the facts as found amount to reasonable cause for delay in applying is one of law and therefore an appeal lay. The fact that the workman thought, as also his officer, that the injury was trivial and nothing serious had happened to him till 1928, when he was prostrated is a reasonable cause for failure to make the claim within the statutory period.

Per *Viscount Dunedin*.—*Lingley* v. *Thomas Firth and Sons*, (1921) 1 K.B. 655, limits too rigidly the enquiry which must be made into the circumstances of each particular case.

WILSONS AND CLYDE COAL CO. *v.* FLYNN, (1930) A.C. 516.

Workmen's Compensation Act, S. 43—Date of disablement of the workmen—Certificate of certifying surgeon—If conclusive and cannot be re-opened by arbitrator.

It may involve hardship and possibly injustice that the certificate of the certifying surgeon as to the date of the commencement of the disablement of the workman should be conclusive as the certificate is given by the surgeon without giving any opportunity to the employers of adducing evidence or of hearing the case put by the workman before the surgeon. In some cases the date may be most material in ascertaining the liability, not only of the respondents in the arbitration, but also the employers who may have employed the workman during the preceding twelve months. But the language of S. 43, sub-S. (2) being clear, it is not open to the Court to give to the words anything but their plain meaning. It is not therefore open to the arbitrator to go behind the certificate so far as the date of disablement is concerned.

M'Dougall v. *Summerlee Iron Co.,* (1927) S.C. (H.L.) 72, explained.

CHOWOOD *v.* LYALL, (1930) 2 Ch. 156.

Land Registration—Effect of—Land belonging to and in the possession of another included in the registration—If the register can be rectified by cancelling the registration of the land.

The plaintiffs purchased certain freehold land and got themselves registered as proprietors of the land under the Land Transfer Acts, 1875 and 1897. But by the date of registration, the defendant had acquired a title by prescription to the fee simple of a portion of the land. In an action by the plaintiffs for an injunction restraining the defendants from trespassing on that portion of the land,

Held, that a plaintiff in an action in ejectment must succeed upon the strength of his own title. The defendant is entitled to plead that he is in possession and leave the plaintiff to oust him by proof of the strength of his title. Under S. 82, sub-S. (1) of the Land Registration Act, 1925, there is power in the Court to order rectification of the register so as to cause the actual delimitation on the maps more accurately to represent what did pass under the conveyance. S. 147 of the Act

in no way purported to, nor did it in fact, limit the power of rectification in S. 82.

GUY PELL *v.* FOSTER, (1930) 2 Ch. 169.

Indemnity and guarantee—Breach of an implied term—Breach going to the root of the contract to indemnify—Guarantor electing to treat the contract as at an end on breach—Guarantee making good the implied term after the election—If can claim the indemnity.

F, the Chairman of a Company which became desirous to issue First Lien Debentures, got the plaintiff *G* to invest some amount in those debentures and agreed to indemnify him against any loss thereon in consideration of his giving *F* one-fourth of any profit he may receive on such investment, any profit therein referred to profit other than interest. The debentures were redeemable in 1925, but as there was power in the Company to extend the due date, it was extended to 1930. In spite of *F's* protestations *G* sold the debentures at a loss without keeping them till the due date, and *F* treated the contract as at an end. After the election by *F, G* again bought back the debentures and claimed the loss from *F*.

Held, that it was an implied term of the contract that *G* would retain the debentures with him and a term which formed the consideration for *F's* agreement to indemnify *G*. Without such retention *G* could not give to *F* the one-fourth share of the profits. The breach of that condition entitled *F* to rescind the contract and once he elected to rescind, the contract was brought to an end and *G* cannot afterwards insist on the contract by saying that he has bought back the debentures and that his prior sale did not prejudice *F* inasmuch as no profits accrued during the period when the debenture was out of his hands.

The case may also be treated as one where *F* unequivocally elected to treat the sale as a final assertion by *G* that he intended no longer to be bound by the contract, and that, therefore, the contract ceased to exist, with the result that *G* cannot now sustain an action upon it.

In re HAGGER FREEMAN *v.* ARSCOTT, (1930) 2 Ch. 190.

Will—Joint will by husband and wife—A life interest on the survivor and remainders over—Will not to be altered or revoked save by mutual agreement—The remaindermen, if take vested interests—If so, in the deceased's share alone or in the survivor's also.

A husband and wife made a joint will in 1902 by means of which they gave everything they possessed to trustees to pay certain debts and legacies and pay the income of the whole of their remaining estate to the survivor of them during his or her life and after the death of the survivor to divide the freehold between six named persons and the residue between two others named the distribution to begin at the death of the first of them. It was agreed that the will should not be altered or revoked except by mutual consent. The wife died in 1904 and some of the legatees died before the husband. The husband before his death made a will bequeathing what he was able to dispose off to legatees, several of whom were not mentioned in the joint will.

Held, when the husband and wife made this joint will, they contemplated that the property which they were pooling would all go to the same beneficiaries, whether in its inception it was the property of the husband or of the wife. On the death of the wife the position as regards that part of the property which belonged to the husband was that he will be treated in this Court as holding the property on trust to apply it in terms of the joint will; at any rate it will be so since the husband took the benefit of the joint will. The husband had no residue to will and the legatees under the joint will took a vested interest on the death of the first of them, the wife.

Dufour v. *Pereira,* (1769) 1 Dick. 419, followed.

LONG ACRE PRESS, LIMITED *v.* CODHANIS PRESS, LIMITED, (1930) 2 Ch. 196.

Company—Issue of 8 per cent. convertible notes—Noteholders to receive a fixed interest and share in profits available for dividend after making certain payments thereout—Directors setting aside profits towards sinking fund—If ultra vires *as affecting 8 per cent. note-holders.*

A Company created a series of 8 per cent. convertible notes and agreed to pay to the holders of the notes interest at 8 per cent. per annum and (omitting unnecessary clauses) to a share in the 'profits of the Company available for dividend in respect of any year' if they exceed the amount required to pay the fixed dividends, etc., payable by the Company. The Company's articles provided that before recommending any dividend, the directors might set aside out of the profits such sums as they thought proper towards sinking fund, reserve fund, etc.

Held, the profits available for dividend only mean profits available for dividend after making any reserve or other similar appropriation which the directors, in good faith, acting on behalf of the Company, think it is their duty to make in the interests of the Company. The note-holders cannot therefore object to the writing off by the directors of a portion of the profits towards debit balances of the Company.

Fisher v. *Black and White Publishing Co.,* (1901) 1 Ch. 174, applied.

In re BUSH *b.* LIPTON, LTD. *v.* MACKINTOSH, (1930) 2 Ch. 202.

Administration—Estate insolvent—Creditor of the estate—Loan carrying interest—Court, if to award only 5 *per cent. under S.* 66 *of the Bankruptcy Act,* 1914.

The rule as to the rate of interest to be allowed in respect of a provable debt is one of the rules 'as to' such a debt and the provision in the Bankruptcy Act, 1914, S. 66, that such rate of interest is to be limited to 5 per cent. until other debts proved have been paid in full is not only a rule 'as to' the debts provable but also a rule 'as to' the priority of the debts proved and provable and, therefore, S. 34 read with R. 2 of part 1 of Sch. 1 of the Administration Act, 1925, incorporated S. 66 of the Bankruptcy Act to that extent.

In re *Whitaker,* (1901) 1 Ch. 9, followed.

In re *Agricultural Wholesale Society, Ltd.,* (1929) 2 Ch. 261 and In re *Wells,* (1929) 2 Ch. 269, not followed as not referring either to the practice of the Chancery Courts or to In re *Whitaker,* (1901) 1 Ch. 9.

HUDD *v.* MATHEWS, (1930) 2 K.B. 197.

Landlord and Tenant Act, 1927, *S.* 4—*Tenancy—Termination of compensation for goodwill—No benefit to landlord from the goodwill—Landlord, if liable to pay compensation.*

Under S. 4 of the Landlord and Tenancy Act, 1927, a tenant of a holding shall be entitled at the termination of the tenancy on quitting the holding to be paid by his landlord compensation for goodwill if he proves that by reason of the carrying on by him or his predecessors-in-title at the premises of a trade or business for not less than 5 years, Goodwill has become attached to it, by reason whereof the premises

could be let at a higher rent than they would have realised had no such goodwill attached thereto. . . .

By virtue of the tenant carrying on the business of an eating house on the premises for more than five years it was found that goodwill had attached to the holding, but it was not clear that only by reason thereof the premises could be let at a higher rent than they would have realised had no such goodwill attached. The County Court Judge held that under S. 4 the tenant was entitled to compensation, if he could prove that by reason of his carrying on the business, goodwill became attached to the premises by reason whereof they could be let as an "eating house" at a higher rent than they would have so realised as an eating house had no such goodwill attached thereto.

Held, by the Court of Appeal, that the section does not say that if a tenant has created a goodwill in premises which he has rented and that goodwill is still attached to it when his tenancy comes to an end, he is to be entitled to compensation for that when he goes out. The section requires proof that the landlord gains by coming into possession of those premises by virtue of that goodwill and if he could let them for a greater rent for some other purpose than the one the tenant used it for, it cannot be due to the goodwill and no compensation will be payable. The Act contemplates benefit to the landlord and not loss to the tenant.

Per *Talbot, J.*—From the fact that reading a section as it stands, a proviso to it may become unnecessary, "it does not follow by any means that the section would not have meant the same thing without it". Such provisos are often put *ex abundanti cautela.*

In re HIRST AND LIVERPOOL VICTORIA FRIENDLY SOCIETY, (1930) 2 K.B. 209: 99 L.J.K.B. 138.

Life insurance—Friendly Societies' Acts of 1896 *and* 1924 *—Insurance on children's lives—Amounts assured exceeding statutory limitations—Clauses restricting the payment to the statutory maximum—Validity of policies.*

Under S. 2, sub-S. (1) of the Friendly Societies' Act, 1924, it is illegal for a Society to insure or pay on the death of a child under certain ages any sum of money which exceeds or which when added to any amount payable on the death of that child by any other Society exceeds a maximum fixed under the Act. The ques-

tion was if three policies in question contravened that provision as the amounts assured exceeded that limit. Policy (1) contained a proviso stating that the amount payable was subject to the following limitations of the Friendly Societies Act, 1924, and the limitations were set out in detail. Policy (2) stated that where the amount secured would exceed the statutory limit, the sum assured shall be limited to that amount. Policy (3) was in favour of a child who was already assured by another society and therefore it stated that "the full sum assured printed in the schedule will not come into operation until the attainment of the age of ten. The combined amount payable in the event of earlier death shall not exceed" the statutory amounts.

Held, the proviso in each case was a contractual term which reduced the assured amount to the statutory limit. The effect of the clauses is that the Company says that "For 2*l*, we are insuring those sums except in cases where they would exceed the statutory limit, in which case the sum assured shall be restricted to that limit" and therefore the policies are valid.

Harker v. *Brittanic Assurance Co.,* (1928) 1 K.B. 766, doubted and distinguished on the ground that there the clause was construed to be a mere statement of the Act of Parliament and not a contractual term.

THE CROXTETH HALL *v.* THE CELTIC, (1930) P. 197.

Shipping—Wreck of ship—Unemployed seaman—Service of the seaman to terminate shortly after the wreck—Compensation if payable for two months' wages or till usual termination—Merchant shipping—International Labour Conventions Act, 1925, S. 1.

By section 1 of the Act "where, by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement", he shall be entitled to be paid his usual wages till he secures an employment, for two months from the termination of the service. But he will not be entitled to wages (*i*) if the owner shows that the unemployment was not due to the wreck or (*ii*) that on any day the seaman was able to obtain suitable employment.

The ships in question were both wrecked but the services of the plaintiffs would have anyhow terminated within a few days after the wreck. The plaintiffs were unemployed for two months. It was in evidence that if all had gone well, the plaintiffs would have been re-employed in service.

Held (per *Scrutton and Greer, L.JJ.*), that the section was clear and unambiguous and that, therefore, neither the preamble nor the League Convention on which the section is based could be looked at to control the plain meaning of the section. The words of the section plainly mean that if his services end before the date contemplated in the agreement, and he is in fact unemployed for two months, he is entitled to wages for every day during the two months on which he is unemployed unless his employer proves that he would have been unemployed even, if there had been no wreck. The section is not dealing with unemployment under an existing contract, but with unemployment in fact. It may be different, if the employer could prove that the employee would not be re-employed after the termination under the agreement.

Per *Slesser, L.J.*, dissenting.—The section being ambiguous the preamble and title can be referred to clear up the ambiguity. The section intends to amend S. 158 of the Merchant Shipping Act by giving the seaman an indemnity for loss of his service by the wreck and the employer would have discharged the onus on him of proving that the unemployment was not due to the wreck by showing that anyhow the services would have terminated under the agreement.

CHAMPAGNE HEIDSEICK ET CIE MONOPOLE S.A. *v.* BUXTON, (1930) 99 L.J. Ch. 149.

Trade-mark—Sale of two varieties of plaintiff's wine—The varieties bearing the marks used by the plaintiff—One variety for sale in France and the other in England—Defendant selling both in England—If infringes trade-mark.

Plaintiffs, producers of champagne in France, produced two types of wine, one for sale in England and the other in France and continent. English type bore the marks "Reserved for England". The type for sale in France was also in similar bottles, but bore the mark "Brut" and "Maison Fondeegen, 1785". The Brut wine was to the knowledge of the plaintiffs being sold in England.

In an action for injunction restraining the defendant from passing off the "Brut" wine as and for the wine reserved for England.

Held, there can be no infringement when the plaintiff's goods are sold with plaintiff's genuine marks. The registration of the trade-mark only gives to the registered proprietor a statutory title in respect of his mark and a right to prevent

others from selling wares *which are not his* marked with that trade-mark, but does not give him a right to object to any person selling or dealing with goods produced by the owner of the trade-mark with the trade-mark affixed. Trade-mark is a badge of the origin of the goods and not a badge of control over the goods. The law in this respect is not altered by the Trade Marks Acts of 1875 and 1905.

LADIES' HOSIERY AND UNDERWEAR, LTD. *v.* PARKER, (1930) 99 L.J. Ch. 201.

Landlord and tenant—Lease—Notice to quit—Person giving notice ceasing to have interest—Effect of—Tenancy for a number of years—Rent payable weekly at a certain rate per week—Tenant holding over—Nature of the tenant holding over—Weekly tenancy or yearly—Effect of continuance of possession by tenant and consent by the new landlord to same—Inference to be drawn.

A notice to quit premises to be complied with at a date long after the person giving notice has ceased to have any interest in the premises cannot have any operation. From a mere continuance in possession by one who originally took possession as tenant under a legal title, with the consent of the person who has become the landlord, an inference may be drawn of a consensus between the landlord and tenant that the tenant shall hold as tenant on the same terms as before.

Doe d. Cates v. *Somerville,* (1826) 6 B. & C. 126 and *O'Keefe* v. *Walsh,* (1880) 8 L.R. Ir. 184, followed.

Where a tenant entered in possession under a lease for three years at a weekly rent of £2 to be paid every week and held over at the expiration of the tenancy, held that only a weekly tenancy resulted from it. An yearly tenancy will be inferred only where the rent is fixed annually, though payable weekly.

R. v. *Herstmonceux Inhabitants,* (1827) 6 L.J. (O.S.) M.C. 35: 7 B. & C. 551 distinguished.

Braithwaite v. *Hitchcock,* (1842) 12 L.J. Ex. 38: 10 M. & W. 494, applied.

TAYLOR *v.* LOCK, (1930) 99 L.J.K.B. 245.

Workman's compensation—Death by accident—Workman getting down employer's lorry on private errand—Attempting to board the lorry in motion—Slipping—If accident arose out of and in the course of the employment.

A licensed driver of a motor lorry while going along on a journey for the employer stopped his engine and got off to see his father working at a distance. The lorry was then driven by the steersman, who was unlicensed. The driver ran up to the lorry while in motion and while attempting to board the moving lorry slipped and fell under the wheels and died. In an action by his wife for compensation, the County Judge held that the accident did not arise in the course of employment as

(*i*) he got out of his employment to get tobacco, and

(*ii*) he was not employed to get on to a moving lorry driven by a person whom he knew was not qualified to drive it.

Held, on appeal, that having temporarily left the employment to go to his father, it was his duty to re-enter the employment, and when he was getting up the step to get into the lorry again he was re-entering his employment.

Lord Sumner's dictum in *Lancashire and Yorkshire Railway* v. *Highley*, (1917) A.C. at p. 372; 86 L.J.K.B. at p. 727 "was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment" has been modified by later cases and the question 'was it outside the scope of his employment to get on to a moving lorry' depends on whether he was acting negligently within the scope of his employment or had taken upon himself in doing so such an added peril as to take the act outside his employment.

EXPRESS DAIRY CO. *v.* JACKSON, (1930) 99 L.J.K.B. 181.

Contract—Restraint of trade—Agreement by employee not to solicit "customers"—Employee, an infant—Breach of covenant—Validity of covenant.

The defendant, while yet an infant, entered into service as a milk carrier with *C*, a dairyman, under a written agreement which provided, among other conditions, that for two years after the defendant left *C's* service, he would not interfere with or serve, solicit or canvass any of the customers belonging to *C's* business with milk or dairy produce either for his own benefit or for any other person. Defendant left *C's* service and against his agreement attended on *C's* customers for the benefit of his new employer.

Held, that an infant may be bound by reasonable restrictions in the contract of employment and even where the contract contains unreasonable stipulations he will be bound provided they are clearly severable from those which are reason-

able and *prima facie* enforceable. The Courts will not enforce a restrictive covenant where it is vague and indefinite. The word "customers" in the clause is too wide and vague and the covenant is, therefore, unenforceable, nor is this a case in which the doctrine of severability should be applied.

How far covenants can be severed and given effect to discussed.

READING TRUST *v.* SPERO, (1930) 99 L.J.K.B. 186.

Moneylender—Loan—Excessive rate of interest—Burden of proof—Courts, when will relieve against—Money lenders Act, 1927.

The defendant, a dealer in antiques, borrowed money at 60 per cent. and 80 per cent. interest from a firm of money-lenders to successfully carry on his business, which was so speculative that the banks would not give him credit.

Before the coming into effect of the Act of 1927, the Court might re-open transactions of money-lending, if it was satisfied that the interest was excessive and the transaction harsh and unconscionable or otherwise such that a Court of Equity would give relief. S. 10 of the Act of 1927 only raises a presumption that where the interest charged exceeds 48 per cent. it is excessive and the transaction harsh and unconscionable, thereby shifting the onus on to the money-lender to prove that the transaction is fair in the circumstances. Where a man of full understanding and in full possession of facts was for his own business purposes content to pay excessive interest, the Court will not relieve him. It is not enough that the interest is excessive, it must also be harsh and unconscionable, though high interest may itself serve as proof of harshness.

Carringtons, Ltd. v. *Smith,* (1905) 1 K.B. 79: 75 L.J. K.B. 49, followed.

STUART *v.* STUART AND HOLDEN (MOON *showing cause*), (1930) 99 L.J.P.D.A. 17.

Divorce—Husband's petition—Decree nisi*—Third party opposing decree absolute on ground of husband's adultery—Husband denying charge—Adultery found—Discretion of Court to make decree absolute—Discretion when to be exercised—Supreme Court of Judicature (Consolidation) Act,* 1925.

Whatever may be said about a case where the husband made a full disclosure of the adultery proved against him at

the time he was complaining of his wife's adultery, the Court will not exercise its discretion under S. 178, cl. (3) and make the decree absolute where the husband not only did not make any disclosure of his own adultery at the time of seeking a decree *nisi* against his wife, but persisted in denying it and falsely swore against it when adultery was set up against him by a third party intervening under S. 183, cl. (2). There must be complete frankness on the part of those who ask for Court's discretion being exercised in their favour.

JOTTINGS AND CUTTINGS.

Sir Montague Lush.—Sir Montague Lush, who has just died at the age of 77, was one of those lawyers whose career, if not made by a book, has been greatly assisted by legal authorship. Mr. Justice McCardie's judgment, which we notice below, is a striking commentary on the complexities of the law of the marriage relationship, and by more than one reference it bears witness to the value of "Lush on Husband and Wife." That well-known work was written soon after Montague Lush had come down from Trinity Hall, Cambridge—a college prolific of judicial talent in recent years—and had been called to the Bar, and he started, too, with the inherited reputation of his father, Sir Robert Lush, a member of the Court of Appeal when that Court was exceptionally strong. But while Fortune favoured Lush at the start, he made his way on his own merits, and when, after a busy career as a junior, he took silk in 1902 he rapidly became one of the most powerful advocates of his time, and his advocacy was based on profound knowledge of the law. From that year until he was made a Judge of the King's Bench Division in 1910, he was one of the most highly esteemed and trusted leaders at the Common Law Bar, and on the Bench he proved himself, as was expected, a valuable and careful Judge. On Mr. Justice Bankes being promoted to the Court of Appeal in 1915, Mr. Justice Lush succeeded him as President of the Railway and Canal Commission. He resigned in May, 1925. His career showed in their best light the qualities of learning, courtesy and strength of character for which the English Bar and Bench are famous.—*L.J.*, 1930, p. 431.

The Maltese Dyarchy.—The Constitution of Malta, granted in 1921, was an interesting experiment in dyarchical government; but it does not seem to be working as its authors hoped. Proceedings towards a General Election had lately commenced

when it appeared that the Roman Catholic clergy would exercise the great influence which they possess in the island to advise their flocks to vote in a certain way. As a matter of policy, (with which lawyers are not concerned) this move was no doubt open to grave objection; but it is a well-known fact in many Continental countries that this influence is used in this way. Last month the Governor, in the exercise of certain powers which enable him to legislate for "the public safety and defence of the Empire," issued an Ordinance staying the elections *sine die*. A good many lawyers who know little about the affairs of the island will probably doubt whether the abolition, even for a season, of the public right of election can be "for the public safety and defence of the Empire." If the elections were so hotly contested that disorders actually arose, no doubt all lawyers would hold that in the presence of such disorder laws are silent, and the Government can do what it pleases. But the mere anticipation of such acts of violence by hot-headed partisans would scarcely seem to have been in the contemplation of the draftsman who defined the power which has now been exercised. Lawyers always like to adhere to a written document, be it contract or Constitution, unless the reasons for ignoring it are of manifest urgency.—*L.J.*, 1930, p. 433.

The Courts and the Legislature.—Nor is it easy to understand the need for the publication of Ordinance No. II of 1930, the substance of which was published in London this week (*The Times*, June 23). Certain Acts were passed by the Legislature of Malta last year, but they were passed when two Senators were sitting who had been unseated by the competent Court—the Court of Appeal in Malta. These gentlemen obtained special leave to appeal to the Privy Council, and, hoping for a successful appeal, continued to sit and vote. The Judicial Committee disappointed them by refusing to entertain the appeal—a decision on which we commented at the time. The question whether the laws so passed were valid then became an issue; and before the Courts could decide it, the Imperial Government intervened with an Ordinance declaring that they should not entertain the question. This Ordinance appears to have been brought into force as a measure of urgency at once, without waiting for the four weeks required by the Constitution between first publication and legal effect. The Governor has this power of peremptory legislation when it is imperatively necessary in the public interest; and it can, of course, be used in a proper case. The constitutional question which followed is—how could such necessity arise before the local Court had

given judgment? A decision adverse to the validity of any law might lead to difficulties which would justify peremptory legislation; but it is not easy to see how it could arise while the matter was still *sub judice*. This view may have weighed with this Court of Appeal which subsequently ignored the Ordinance. On the whole, it is well that Malta has still the strong and skilful hand of Downing Street to get her out of her troubles.—*L.J.*, 1930, p. 433.

A Chancellor Saint.—The canonization of a Lord Chancellor is a matter of rare occurrence; but so far as a poor layman may judge of such matters from the evidence before him, Sir Thomas More is not the least deserving of the Saints. His life, according to the evidence of his son-in-law and of others, was one of remarkable and consistent piety; and his judicial murder, as one competent biographer describes it, was the direct and by him foreseen result of his refusal to do that which his conscience forbade. As a youthful M.P. he spoke up like a man against the financial encroachments of King Henry VII; and despite all the influences, favours and cajolery to which he was subjected by King Henry VIII, he could not be persuaded to share the views of the Merrie Monarch on Divorce or on the headship of the Church. A splendid fellow, undoubtedly, in his life and death, was Sir Thomas More.

As Chancellor he was indubitably a success; and the account of how he cleared off the accumulated arrears of his incompetent predecessor makes good reading. Incorruptible in an age of bribery, he was without offence; and his enemies could find no rope to hang him, even with the aid of a packed jury, until Counsel for the Prosecution, deserting his proper place for the witness box, swore his life away with queer evidence of an alleged seditious conversation in the Tower.—*L.J.*, 1930, p. 444.

Down-Grade Diet: Lincoln's Inn to Oxford University.—He maintained in his own household his sons and daughters, their spouses and families; guests came and went, and his house at Chelsea was reported to be "a veritable school of the Christian religion." But the time came, after he had resigned the Chancellorship and refused to accept from the Churches a gift of 5,000*l*., when he could no longer maintain from his own resources so large a family; and thus he addressed his sons:

"If we wish to live together you must consent to be contributories together. But my counsel is that we fall not to

the lowest fare first; we will not therefore descend to Oxford fare, nor to the fare of New Inn; but we will begin with Lincoln's Inn diet, where many right worshipful men of great account and good years do live full well; which, if we find ourselves the first year not able to maintain, then we will the next year come down to Oxford fare, where many great, learned and ancient fathers and doctors are continually conversant; which, if our purses stretch not to maintain neither, then may after with bag and wallet go a-begging together, hoping for pity some good folk will give us their charity."

But Bluff King Hal proceeded: after More's death his head was stuck on a pike at London Bridge, the happy home in Chelsea was taken, and all his goods declared forfeit to the Crown.—*L.J.*, 1930, p. 444.

McCardie, J., misunderstood.—I observe that the long discourse of McCardie, J., on the Law of Husbands and Wives, has given some people the erroneous impression that he is opposed to Women. But the intelligent majority have frankly recognised the truth of his observations and join with him in the pious hope that Parliament will do something about it. Husbands and wives are, generally speaking, no longer one in law except in so far as this theory operates to the advantage of the wife and the disadvantage of the husband. His ancient dominion has departed, but his liabilities, in amazing number and variety, remain. And he would be a bold fellow who in our time dared to introduce and carry a Bill in Parliament to abolish the differences. The time is certainly not ripe for the abolition of the husband's legal liability to maintain his wife and to pay for "necessaries" in accordance with the ancient and reasonable rule.

But why the poor fellow should still be legally liable for his wife's manifold and multifarious torts is beyond justification. If the present Attorney-General could find the time he might establish his place in legal history and forever justify his acceptance of the law officership by gathering his draftsmen about him and introducing an Act to be known popularly as the Jowitt Act, putting these matters right as between man and wife.—*L.J.*, 1930, p. 444.

Summing up a Judge.—The summing up by his surviving contemporaries of a departed Judge is always interesting, particularly in regard to the qualities which are not mentioned. I came recently on references made to Kekewich, J., a Chancery

Judge well known and remembered. The Master of the Rolls, in a moving address to the Bar, described the late Judge as "painstaking, industrious and high-minded." He knew much law, but his applications of it did not always commend itself to all and many of his judgments were reversed on appeal.

Once Kekewich, J., observed to counsel that if he (the Judge) were to do so-and-so as a trustee, he would be compelled to give judgment against himself. "But, of course, your Lordship would appeal," said the helpful counsel. "This, my Lords,'' said counsel for the appellant in opening his case in the Court of Appeal, "is an appeal from the judgment of Mr. Justice Kekewich. But there are other reasons for saying that the judgment is wrong."

A brother Judge once described him as "quick, courteous and wrong," while Lord Bowen's remark on another occasion was to the following effect: "To have a judgment by my brother Kekewich in your favour is like putting to sea on a Friday—unfortunate, but not necessarily fatal."—*L.J.*, 1930, p. 444.

India and the Royal Title.—Whatever changes may, in the course of the years, be made in the Government of India, the Sovereign may alter or amend his title without Parliamentary enactment to meet any changes or occasions which may arise.

The Statutes dealing with the question of Royal Titles have omitted to bind the Sovereign to any specific Colonial designation. Later enactments followed the precedent of 1876. By 39 and 40 Vict., c. 10, it was left to Queen Victoria to say what the future description of the Sovereign in regard to India should be. "It shall be lawful," declared the Statute after preamble in plenty, "for her Gracious Majesty, with a view to such recognition as aforesaid of the transfer of the Government of India, by her Royal Proclamation, under the Great Seal of the United Kingdom, to make such addition to the style or title at present appertaining to the Imperial Crown of the United Kingdom and its dependencies as to her Majesty may seem fit."

It was in accordance with this provision the Queen, by Royal Proclamation, became Empress of India; and the precedent was followed by similar provisions and proclamations on the accession of King Edward and King George.—*L.J.*, 1930, p. 444.

Pensions for Solicitors' Clerks.—In dealing last week with the Report of the Council of the Law Society, we referred to the

fact that the proposal to provide pensions for solicitors' clerks had, after careful consideration, become an established fact, and that sufficient promises of support had already been received to render the scheme actuarially sound. The prospectus and rules of the scheme, which is called the Solicitors' Clerks' Pension Fund, has now been published, and we print, in another column, a short statement with regard to it. The scheme has obviously been very carefully framed, and we commend it warmly to the attention of solicitors and their clerks. A clerk who joins as a young man and who is employed throughout his career by a solicitor who is ready to make the employer's contribution will become entitled, on retirement at 65 or later, to a pension on extremely favourable terms. Provision is made for the case of the death of the clerk before attaining the pensionable age and for the commutation, in approved cases, of a pension for one of reduced amount payable during the lifetime of the clerk and his wife and the survivor. We are not quite clear as to the position of a member of the fund who, after having been a member for, say, twenty-five years, becomes a solicitor and goes into partnership or starts to practise on his own account; nor does the position of a clerk who, having for some years been a member of the fund, changes his situation and enters the employment of a solicitor who refuses to pay the employer's contribution, seem to be expressly dealt with. As time goes on and the benefits of the fund, both to solicitors and their clerks, are more fully realised, cases of the latter kind are likely, we imagine, to become very rare; but it should be possible, where such cases do occur, for the clerk to continue as a member by paying either the whole contribution himself or the employee's contribution with a proportionately reduced benefit in respect of the period during which half contributions only are paid.—*L.J.*, July 5, 1930, p. 1.

Crime in 1928.—The elaborate tables of figures which form the *Criminal Statistics* for England and Wales for the year 1928 and which have just been issued (Cmd. 3581) are prefaced by a remarkably interesting Introductory Note, the work of Mr. Arthur Locke, C.B.E., of the Home Office, which runs to sixty-nine pages and is entitled, "The Offender and the Community, before the War and Since." We cannot attempt in a couple of short paragraphs to deal adequately with what is an admirably written essay on a subject of great interest and much importance; but a few points may be noted. For the purposes of comparison with the year 1928, the average of the quinquennium 1910-1914 is taken; and it is not very satisfactory

to note that the number of indictable offences known to the police rose from 97,924 to 130,469, or 33 per cent., whilst the population increased by only 9 per cent. During the war the figures fell, but since the war, and allowing for an exceptional increase in 1926 which is attributed to the General Strike, there has been a steady rise. Crimes of violence against the person, taken as a whole, have decreased—murder by 11 per cent., endangering railway passengers by 72 per cent. and cruelty to children and abandonment by 66 per cent.; but the procuring of abortion has increased from an average of 40 in 1910-14 to 113 in 1928 or 185 per cent., and Mr. Locke, speaking with all the authority of an Assistant Secretary of the Criminal Division of the Home Office, says that these figures no doubt reflect a real increase in this offence. Sexual offences also unhappily show a very substantial increase; bigamy has increased by 120 per cent., and indecent assaults by 57 per cent., though rape has decreased by 34 per cent. Drunkenness has enormously decreased; the number of summary proceedings in 1928 for drunkenness, simple or aggravated, was nearly a hundred and thirty thousand fewer than the average of the years 1910-14; and crimes likely to be associated with drunkenness, such as personal violence, cruelty and neglect, decreased also, though not, of course, in anything like the same proportion.—*L.J.*, 1930, p. 2.

Dog Left in a Car.—The case of *Fardon* v. *Harcourt-Rivington,* disposed of last week by Mr. Justice Talbot and a common jury, was a most unusual action for negligence brought against the owner of a dog. The plaintiff on an evening of April 1929, walked past the defendant's saloon car, which had been parked with its back to the kerb in a street at the rear of Selfridge's Stores. The defendant had left a young Airedale dog in the car for upwards of an hour, and the dog had been barking and "jumping about on the seat". As the plaintiff passed, the dog smashed the glass panel at the back of the vehicle, and a splinter of glass entered the plaintiff's left eye. Four days after the eye had to be removed. The defendant stated that it was his invariable practice to leave the dog in the car while shopping, and it was held that there was no evidence that the animal was anything but docile and quiet. His Lordship told the jury that, however much they might sympathise with the plaintiff, they should not award damages unless the defendant had done some legal wrong. The jury found for the plaintiff and awarded him £2,000 damages. Now the "possible foresight of a reasonable man" may in this case at least be taken as the

test both of the existence of negligence and of the remoteness or otherwise of the consequences. A young dog kept in a car for an hour is bound to become noisy and restive. "As noisy as a dog in a cart" is proverbial in some parts of the country. But would a reasonable man expect a fairly docile dog accustomed to being left in a car to smash the small glass panel at the back, through which only its head and paw could protrude? We very much doubt it!—*L.T.*, July 5, 1930, p. 2.

Patchwork Divorce Law.—We have it on the authority of the New Testament that new cloth should not be used to patch old raiment lest the rent be thereby made worse, and, according to Mr. Justice Hill's latest *obiter dicta* uttered in the hearing of a case last week, there is ample illustration in the state of affairs prevailing at present in the Divorce Court of the unsatisfactory results which follow disregard of the axiom. Consisting as it does in great part of the old ecclesiastical law and in part of various statutory provisions, influenced moreover by the common law, and insensibly modified by the shifting of public opinion in social matters, the divorce law of to-day is certainly full of anomalies, the more obtrusive of which must seem frankly insensate to anyone unfamiliar with its evolution. The subject which gave rise to Mr. Justice Hill's strictures on this occasion would seem to have been the rule of evidence explicitly applied to divorce suits by the proviso to section 3 of the Evidence Further Amendment Act of 1869 by virtue of which neither parties nor other witnesses are liable to be asked or bound to answer questions tending to prove adultery unless they shall have already given evidence in disproof thereof. That this limitation should still apply in the case of the parties to the suit although the presence or absence of adultery is commonly the pivot on which the whole proceedings swing is certainly not calculated to facilitate the work of the court, which is left, in the phrase of Mr. Justice Hill, to shuffle along as best it can.—*L.T.*, 1930, p. 2.

Directors and their Fees.—The decision in In re *Coliseum (Barrow), Ltd.*, reported in *The Times* of 26th March, and in [1930] W.N. 101, is of some importance, for it establishes that directors proving in a winding up for their fees cannot recover fees due more than six years, for the reason that balance sheets in which fees appear cannot amount to acknowledgments within Lord Tenterden's Act. The combined effect of section 1 of that Act and section 13 of the Mercantile Law Amendment Act of 1856 is to make a written acknowledgment signed by

the agent of the party chargeable sufficient, in an action of debt, to take the case out of the Statute of Limitations. In the case before the Court, which had been brought as a test case to have the point decided, the liquidator had rejected the proof of the applicant, a director, to the extent of something over one-third, alleging that his fees to that amount were statute-barred because outstanding for more than six years. Evidence was given that the fees appeared in balance sheets passed at Board meetings and duly signed by two directors, and it was therein that the mischief lay, for Maugham, J., held that "directors cannot double the parts of agents of the company to make an acknowledgment and creditors of the company for directors' fees." Balance sheets, as they are signed by directors, can amount to acknowledgments that the company owes sums therein mentioned to, *e.g.*, shareholders to whom the balance sheets are circulated, and, apparently, to anybody save directors. Directors, however, said Maugham, J., would be "interested in the matter, and so incapable of passing the resolution so to bind the company." Thus it seems that the passing of the resolution adopting the balance sheet does as much as the signing of the balance sheet by two of the directors to disqualify all the directors from being creditors for the fees. In future, the only course for directors who, while prepared to be lenient when their companies are in difficulties, are unwilling to forego their fees altogether, is not to let them remain outstanding for too long a time.—*S.J.*, 1930, p. 325.

Erosion of Case Law.—Sir Thomas Browne, of whom it has been well said that to know his writings is no small part of a liberal education, and of whom it may also be said that he had a genius for artistic phrasing, has, in his "Hydriotaphia," a striking sentence in which he speaks of "Time, which antiquates antiquities and hath an art to make dust of all things," thus giving to a very common-place thought regarding the ravages of time on everything mundane a new force by the exquisiteness of its language. The observation finds its application in the sphere of law as in aught else of human activity, despite the supposed conservatism of everything legal. In one of his letters, Lord Bowen discusses the project of attaining immortality by writing a book on English Law, and adds, with a touch of sadness, "you write a history of the law, or a treatise about it, and then a puff of reform comes and alters it all, and makes your history or treatise useless." But not only is law "antiquated" by legislative innovations: it becomes so also by changes in habits both of business and social life.

Some sixty years ago Chief Baron Pollock enquired in *Clay* v. *Roberts,* 8 L.T. 397, whether it would be libellous "to write of a lady of fashion, that she had been seen on the top of an omnibus," and although he considered that to do so would not constitute a legal injury for which damages could be recovered, he obviously thought it would be a gross breach of taste. *Autres temps, autres moeurs.* Who would dream of putting such a question now? Forty years ago the Court of Appeal decided in *Pullman* v. *Hill & Co.* (1891) 1 Q.B. 524, that it was not reasonably necessary and in the ordinary course of business for a merchant to dictate to a shorthand clerk a letter containing defamatory matter in reference to the addressee, and that, consequently, the occasion was not privileged. The decision has been adversely criticised, distinguished and queried, on various occasions, and now it would appear to have received its *coup de grace* in *Osborn* v. *Boulter & Son,* which was before the Court of Appeal on 16th May, and where it was said that what may not have been reasonably necessary and in the ordinary course of business in 1891 had certainly become both reasonably necessary and in the ordinary course of business in 1930. Time has thus "antiquated" *Pullman* v. *Hill & Co.,* and practically relegated it to a decision on fact which in the course of forty years has ceased to be fact. Just as many parts of our coast line suffer from erosion, so in the same way many of the cases which were thought to be landmarks of legal principle are, through changes of habits and changes of thought, eaten into and found to be little more than shifting sand.—*S.J.,* 1930, p. 326.

Case Law Slavery.—Mr. Hammond in his book on Legal History says that: "Our Common Law is really judge-made law and has been developed and adapted to varying conditions ever since its early stages. It still grows, and even at the present day custom is incorporated into it." The interesting part of this extract are the words "has been developed and adapted to various conditions." Conditions, indeed, have changed much during the centuries over which our case-law extends, but that principles have also altered too is not so readily acceptable. An unusual but not surprising reference to case-law was recently made by Mr. Justice McCardie, who, when his attention was drawn by counsel to a decision given in the last century, said: "My own view is that this slavery of case law which exists to-day is doing infinite harm to English law. To my mind principles and decisions should change with the times." His Lordship went on to say that he had been looking at some

of the decisions given in the sixteenth and seventeenth centuries by which he was said to be governed, and he expressed the view that they were given at a time when superstition was so prevalent and foolish notions so dominant that, but for the doctrine of precedent, one would reject those decisions as being vanities. His Lordship has, no doubt, voiced the opinion of other Judges who, on many occasions, must have longed to shake off the strangling fetters of case-law inconsistency and give an independent decision based on the application of a principle to modern facts. With regard to principle, one might, with respect, differ from his Lordship, by denying that principles should change with the times. Principles are immutable; it is merely the application of the principles to widely varying sets of facts that requires reviewing in the light of modern ideas. So different, in fact, are modern conditions from those of some centuries ago that it may well seem that fundamental principles themselves have undergone a change. What, however, is the alternative to case-law, but independent decision, where each Judge decides when and how a principle applies entirely irrespective of the views a brother Judge may be expressing in the adjacent court. In that event, it is submitted, chaos more appalling than that which Mr. Justice McCardie said existed in case-law might probably result. Imagine only the immense difficulty counsel would experience when searching diligently for argument in support through a wide field of possibly inconsistent expressions of opinion. Perhaps, though, if a Judge could give an independent decision he would not require the assistance of the view of others on similar matters, and then law reports would cease. Obviously, the most satisfactory practice would be that case-law should continue, but with a discretion in a Judge, not to be abused, that he may exercise his own judgment in cases to which old decisions are manifestly not applicable to modern circumstances.—*S.J.*, 1930, p. 341.

Soviet Marriages.—The decision of Hill, J., in *Nachimson* v. *Nachimson, ante*, p. 14 (1930) P. 85, that a Soviet marriage cannot be recognised as legal in our courts, was one as to which, our readers may remember, we expressed considerable doubt. It has now been overruled by the Court of Appeal (74 Sol. J. 370). The Russian law appears to allow such easy divorce that Hill, J., held in effect that marriages under it were mere unions at will, and not permanent. Whether any divorces could be much easier than those at Reno, or even in our own court on hotel bill evidence, may be a controversial question; but Hanworth, M.R., pointed out in his judgment that the most

faithful adherents of life-long monogamy could do no more in Russia than Mr. and Mrs. Nachimson had done to solemnise their union, and that *prima facie* every Russian marriage, like every English marriage, must be deemed to be made "till death us do part." The polygamy cases, where one man can lawfully be the husband of two or more women simultaneously, are of course on a different footing. The previous recognition in our courts of foreign Jewish marriages, subject to the rule of the "ghet" divorce, was in fact entirely inconsistent with the decision of Hill, J., in *Nachimson,* an inconsistency pointed out on p. 57, *ante,* by our sprightly correspondent, Miss Rosa Dartle—whom Mr. Copperfield will no doubt be able henceforth to meet without the shadow of an insoluble legal riddle between them. See also our note on *Spivack* v. *Spivack, ante,* p. 96. The essence of the decision of the Court of Appeal is that, given a marriage made for life or until dissolved by law, it will be recognised here without reference to the ease or otherwise of its dissolution.—*S.J.,* 1930, p. 360.

The Quality of Mercy.—"Compounding a felony," says "Wharton's Law, Lexicon," "is where the party robbed not only knows the felon but also takes his goods again, or other amends, upon an agreement not to prosecute." The Attorney-General in a recent case before Mr. Justice Rowlatt objected to a suggestion which, he said, had been advanced before the Commissioners of Inland Revenue that revenue officers had entered into negotiations to purge a criminal offence. In the case in question the appellant, after an enquiry into his books and accounts, had had to pay a considerable sum in respect of previously unpaid super-tax, income-tax and excess profits duty. A few days before the last instalment was paid a prosecution was launched against him under the Perjury Act, 1911. He was committed for trial. His health was very bad, however, and the prosecution was dropped, the then Attorney-General being satisfied that if it were carried on the appellant's life might be endangered, and, in consequence, the appellant paid £300,000 in penalties. Commenting on the above facts, Sir William Jowitt, K.C., the Attorney-General, said that before the Commissioners the suggestion was made that the Crown accepted the £300,000 in penalties in lieu of taking criminal proceedings, and were actuated in doing so not simply and solely by reason of the appellant's condition of health, but that they had, in fact, compounded a criminal offence. The revenue officers, he added, took a very serious view of that suggestion. Counsel for the appellant said that he did not understand that

that had been done; it certainly was not suggested now. It does seem remarkable that a suggestion such as that alleged could be made against responsible revenue officials who could have no conceivable personal interest in adopting the measures imputed to them. What, rather, is the striking feature of the matter is the humane consideration exhibited by the authorities, indicating that the State will not, when extreme ill-health makes it unadvisable, relentlessly and unnecessarily pursue a matter in the criminal courts when there is an alternative and satisfactory civil remedy. "The quality of mercy is not strained." —*S.J.*, 1930, p. 375.

BOOK REVIEWS.

THE PROVINCIAL INSOLVENCY ACT, by A. C. Ghose. Third Edition. Published by M. C. Sarkar & Sons, Calcutta. Price Rs. 6.

The third edition of this exhaustive commentary on the Provincial Insolvency Act contains, as was expected, all the improvements that are necessary to make it much more useful than the previous ones. The author gives his own views, wherever he deems it but pertinent to give expression to them, along with his elaborate notes to every section. The subject being a much-discussed one and the case-law upon it having grown fairly copious, the author might not have had considerable difficulty in collecting the relevant information under each section. But in addition to the general satisfaction which we feel about the book, we are glad to note that some of the suggestions for improvement made by us in respect of the previous edition are carried out, when we find the English Bankruptcy Act and the Presidency Towns Insolvency Act have been included in the appendices to this volume. The printing of the Civil Justice Committee's Report in the first few pages adds to the value of the book as it will enable the readers to have a historical and analytical survey of the Act, which is essential in the scheme of a work of this kind.

SNELL'S PRINCIPLES OF EQUITY FOR THE USE OF INDIAN STUDENTS, by S. C. Bagchi. Published by Messrs. Sweet & Maxwell, Ltd., London, 1930. Price Rs. 14-7-0.

It is needless to introduce to the legal world a standard treatise like this on the principles of Equity. But the purpose

of the present edition is to suit the needs of the students of Indian Universities. This attempt deserves all the praise for the careful editing as well as the retention of the arrangement and language of the original as much as is consistent with the scope and nature of this work. For acquiring a sound knowledge of the fundamentals of the subject one has to get thorough with this book.

THE LAW OF MALICIOUS PROSECUTION, by K. G. Kale. Published by Ramakrishna Bros., Law Publishers, Poona, 1930. Price Rs. 2.

This small volume deals with the subject of malicious prosecution. We have had occasions to find this subject treated along with the other important branches of the law of Torts by book writers. We find an earnest attempt made here to elucidate the various points under the relevant headings. The small size of the book has not disallowed room for the mentioning of a number of cases which form the chief source of much of the information gathered by the author. We are sure that it will be of immense help to students of colleges as well as practitioners.

THE INDIAN SALE OF GOODS ACT, by P. S. Narayanaswami Aiyar and A. S. Srinivasa Aiyar. Published by the Law Publishing Co., Mylapore, Madras, 1930. Price Rs. 4.

One finds it a little embarrassing to choose any one book in the plethora of publications of fresh commentaries on the Sale of Goods Act. But that need not necessarily encourage us to withhold our due appreciation of the work of the present authors who have not spared any pains to make this book quite useful. Of course, the amount of labour spent and the discretion exercised in the search for and selection of cases, both English and Indian, that have contributed much to the principles underlying the sections thereunder, are highly commendable. With regard to some points on which the authors try to differ from the opinions of the Special Committee that drafted the Act, we need hardly express that anything from us, for or against such a discussion, will be premature now in the initial stages of the working of the Act itself.